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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1175

In the Matter
of
NEW YORK, ONTARIO AND WESTERN RAILWAY COMPANY,

Debtor,

THE PEOPLE OF THE STATE OF NEW YORK, THE DIRECTOR OF DIVISION OF SELF INSURANCE, THE INDUSTRIAL COMMISSIONER and the WORKMEN'S COMPENSATION BOARD OF THE STATE OF NEW YORK,

Petitioners,

against

RAYMOND L. GEBHARDT and FERDINAND J. SIEGHARDT, as Trustees of the above named Debtor,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Attorney General of the State of New York,
Attorney for Petitioners.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

PAGE

Petition for Writ of Certiorari 1
Opinions Below 2
Jurisdiction 2
Summary Statement of Matters Involved..... 2
Facts 2
Specification of Error 5
Reasons for Allowance of Writ..... 5
Brief in Support of Petition 7
Conclusion 17

Table of Statutes.

Bankruptcy Act, former § 77 2
Judicial Code, 28 U. S. C. A. § 347(a)..... 2
Laws of N. Y. 1928, Ch, 678..... 3
N. Y. Workmen's Compensation Law § 50, subd. 3..3, 5, 12
N. Y. Civil Practice Act § 266.....14, 15
N. Y. Court of Claims Act § 8..... 15
N. Y. Court of Claims Act § 9..... 15
United States Constitution, Eleventh Amendment..2, 4, 5, 7, 9, 10

Table of Cases.

Ayers, *In re,* 123 U. S. 443..... 7
Bajardi, *In re,* 9 F. (2d) 797, cert. den. *sub. nom.* People v. Wilson, 270 U. S. 651..... 10
Breen v. Mortgage Commission, 285 N. Y. 425..... 7
Bricken Constr. Corp. v. Cushman, 163 Misc. 371..... 15
Cargile v. New York Trust Co., 67 F. (2d) 585, cert. den. 292 U. S. 625 8

PAGE

Edlux Construction Corp. v. State of New York, 252 App. Div. 373, aff'd, 277 N. Y. 635 8
Fidelity Assurance Ass'n, *In re,* 42 F. Supp. 973, order rev'd 129 F. (2d) 442, cert. granted 317 U. S. 614, aff'd, 318 U. S. 608 10
Ford Motor Co. v. Department of Treasury, 323 U. S. 459 9
Great Northern Life Insurance Co. v. Read, 322 U. S. 47 8
Hagood v. Southern, 117 U. S. 52 7
Hobbs v. Occidental Life Ins. Co., 87 F. (2d) 380..11, 13
Hopkins v. Clemson College, 221 U. S. 636 11
Jackson v. State, 261 N. Y. 134 15
Kaufman v. Provident Savings Bank & Trust Co., 23 N. Y. S. (2d) 637, aff'd, 263 App. Div. 703, leave to app. den. 263 App. Div. 809 15
Kennecott Copper Corp. v. State Tax Commission, 327 U. S. 573 .....9, 16
Lankford v. Platte Iron Works, 235 U. S. 461 8
Libby v. Hopkins, 104 U. S. 303 14
Louisiana v. Jumel, 107 U. S. 711 7
McQueeney v. Sutphen & Myer, Matter of, 167 App. Div. 528 13
Metropolitan Trust Co. v. State Board of Tax Commissioners, 220 N. Y. 344 8
Mine Safety Co. v. Forrestal, 326 U. S. 371 10
Morris v. Windsor Trust Co., 213 N. Y. 27 14
Murray v. Wilson Distilling Co., 213 U. S. 151 8
Pink v. Title Guarantee & Trust Co., 274 N. Y. 167..14, 15
Porter v. Beha, 12 F. (2d) 513 11
Samuel Adler, Inc. v. Noyes, 285 N. Y. 34 8
Saranac Land & Timber Co. v. Roberts, Comptroller, 195 N. Y. 303 7
Siegel v. State, 262 App. Div. 388 13

PAGE

Smith v. Reeves, 178 U. S. 436 8

State of New York, Matter of, 256 U. S. 490 .....8, 10

U. S. Dept. of Labor v. Remund, as Admr. etc., U. S. Sup. Ct., March 17, 1947 (U. S. Supt. Ct. Bulletin, Vol. 7, No. 19 7

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Respondents,

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The People of the State of New York, the Director of Division of Self Insurance, the Industrial Commissioner, and the Workmen's Compensation Board of the State of New York, petitioners herein, respectfully pray for a writ of certiorari to review the judgment or "Order for Man-

date" of the United States Circuit Court of Appeals for the Second Circuit entered January 13, 1947 (R. 74), which modified an order of the United States District Court for the Southern District of New York (R. 7-8), entered pursuant to the opinions of the District Court, dated September 20, 1945 and April 4, 1946 (R. 9, 34-40).

Opinions Below

The opinions of the District Court (R. 34-40) are not reported. The opinion of the Circuit Court of Appeals (R. 68) is reported in 158 F. (2d) 769.

Jurisdiction

The Circuit Court of Appeals entered its order for mandate on January 13, 1947 (R. 74). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 [28 U. S. C. A. § 347(a)].

Summary Statement of Matters Involved

The case involves the question whether the District Court has jurisdiction to direct, in summary proceedings or otherwise, that officers, agents or employees of the State of New York turn over property to which the State claims title, as against the claim of the petitioners that the proceeding constitutes a suit against the State of New York in violation of the Eleventh Amendment to the United States Constitution.

Facts

1. On May 20, 1937, the Debtor filed its petition for reorganization under the then Section 77 of the Bankruptcy Act. Thereafter, the District Court appointed a trustee

who qualified and continued to act as such until December 22, 1944, when Raymond L. Gebhardt and Ferdinand J. Sieghardt were appointed as Trustees and qualified (R. 10).

2. Prior to the filing of such petition, the Debtor had delivered to the Industrial Commissioner of the State of New York securities belonging to the Debtor having a par value of $160,000, in compliance with and pursuant to Subdivision 3 of Section 50 of the Workmen's Compensation Law of the State of New York (R. 10), as proof of financial responsibility as a self-insurer (R. 53-54).

3. On December 21, 1943, the Trustee made application to the Industrial Commissioner of the State of New York for the return of the securities and prior to the institution of the proceeding in the District Court complied with certain conditions set forth by the Industrial Commissioner for the return of such securities (R. 11-14). The Trustee, however, failed to inform the Industrial Commissioner of an indebtedness of the Debtor to the State of New York for the Debtor's share of grade crossing eliminations constructed on the line of the Debtor's railroad pursuant to Chapter 678 of the Laws of 1928 (R. 13), in a sum in excess of $160,000 for past due installments (R. 15-16).

4. As soon as the State of New York ascertained that it had in the possession of a state agency the amount delivered to it by the Debtor at the time it became a self-insurer, the State asserted the right to apply it to the undisputed indebtedness to it for grade crossing elimination and instructed its officials not to turn over this amount to the Trustees and that it be applied in reduction of the indebtedness to the State of New York (R. 15-16).

5. Thereupon, the Trustees instituted a summary proceeding in the District Court for the Southern District of

New York to compel the State of New York and its various officials to turn over such securities (R. 42-49).

6. The State of New York and the various officials and boards sued as such filed an answer challenging the jurisdiction of the District Court to entertain the proceeding against them in view of the provisions of the Eleventh Amendment to the Constitution of the United States and by reason of the fact that the State of New York claimed the title to the property delivered to it by the Debtor and in its possession for the past due and unpaid installments of the Grade Crossing Elimination Tax amounting to $168,447.56 (R. 28-29, 55-57).

7. The District Court for the Southern District of New York held that the purposes for which the securities were delivered had been fully satisfied and discharged, and that, therefore, the Trustees were entitled to a direction for the summary return of such property (R. 34-40). The District Court, accordingly, directed the State of New York and the various state agencies named as such in the proceeding forthwith to surrender the securities to the Trustees (R. 8).

8. Upon appeal, the Circuit Court of Appeals for the Second Circuit modified the decision of the District Court so as to eliminate the State of New York as a party and to dismiss the petition as to it and otherwise affirmed the order of the District Court (R. 73).

9. In its decision, the Circuit Court of Appeals held that the State of New York had no proprietary interest in the securities; that even if it had a pecuniary interest, its claim was but colorable and that, therefore, the proceeding is not a suit against the State within the prohibition of the Eleventh Amendment to the Constitution of the United States (R. 71).

Specification of Error

The Circuit Court of Appeals has erred in holding that the proceeding is not a suit against the State of New York in violation of the Eleventh Amendment and that the District Court for the Southern District of New York had jurisdiction to entertain a summary proceeding which would require the State officers to turn over property which the State has in its possession and to which it claims title, by reason of the Trustees' indebtedness to the State for the monies due under the Grade Crossing Elimination Act.

Reasons for Allowance of the Writ

1. The question is one of general interest and importance. The extent to which the District Courts may limit the operation and effect of the Eleventh Amendment by an examination of the merit of a State's claim to property in the possession of its officials and a determination, after such examination, that the claim of the State is but colorable, are matters which call for earnest consideration and judicial clarification by this Court.

2. The suit is one against the State of New York, the petitioners having no personal interest therein and being sued solely in their official capacity as agents of the State. The decision of the Circuit Court of Appeals attempts to avoid the immunity of the State by omitting the State and by directing its order against the officers of the State, although they have no personal interest and are acting solely as agents of the State.

3. The adverse decision of the Circuit Court of Appeals is contrary to the recent decisions of this Court.

4. The construction by the Circuit Court of Appeals of Section 50, subdivision 3, of the Workmen's Compensation

Law of the State of New York, as creating a fiduciary relationship between the self-insurer and the State official to whom securities are delivered thereunder and barring any counterclaim to the property by the State was unwarranted, and was in effect the determination of a question of law that except for the pending proceeding in Bankruptcy could only have been determined by a suit in the Court of Claims of the State of New York.

WHEREFORE, Petitioners respectfully pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered on its docket 20350, and that said decree of the United States Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, and that petitioners may have such other and further relief in the premises as to this Honorable Court may seem just.

Dated March 15, 1947.

THE PEOPLE OF THE STATE OF NEW YORK,
THE DIRECTOR OF DIVISION OF SELF INSURANCE,
THE INDUSTRIAL COMMISSIONER and the
WORKMEN'S COMPENSATION BOARD OF THE STATE
OF NEW YORK,
By NATHANIEL L. GOLDSTEIN,

Attorney General of the State of New York.

WENDELL P. BROWN,
Solicitor General,

SAMUEL A. HIRSHOWITZ,
Assistant Attorney General,
of Counsel.

BRIEF IN SUPPORT OF THE FOREGOING PETITION

POINT I

The suit is one against the State of New York, the petitioners having no personal interest therein and being sued solely in their official capacity as agents of the State.

The Circuit Court of Appeals, in its opinion, recognized that *at least* so much of the order of the District Court as was directed specifically against the State of New York was in violation of the Eleventh Amendment, but held that by eliminating the State as a nominal party and modifying the order so as to deny the relief as against the State directly, the error of the District Court was cured.

However, the mere act of eliminating the State as a nominal party to the proceeding did not alter the fact that the proceeding actually is a suit against the State. The immunity of the State from suit in the District Court cannot be avoided by the expediency of limiting the suit to one against the State officials.

Louisiana v. *Jumel*, 107 U. S. 711;
Hagood v. *Southern*, 117 U. S. 52;
In re Ayers, 123 U. S. 443;
Breen v. *Mortage Commission*, 285 N. Y. 425, 429;
Saranac Land & Timber Co. v. *Roberts, Comptroller*, 195 N. Y. 303.

The State officials, here, are sued solely in their official capacity. They all constitute an integral part of the Department of Labor. Cf. *U. S. Dept. of Labor* v. *Remund as Admr, etc.*, U. S. Sup Ct., March 17, 1947 (U. S. Sup. Ct. Bulletin, Vol. 7, No. 19). They have no personal interest in the litigation. The property involved was delivered to them solely as State officials. Their possession is that of the

State of New York and they are subject to the direction of the executive officers of the State in dealing with such property. The State has directed its officials to apply this property to an undisputed indebtedness of the Debtor to the State in a sum in excess of the value of the property. The order of the Circuit Court of Appeals collides directly with the instructions given to these State officials by the State and, if complied with, would result in a pecuniary loss to the State of the value of the property which it has applied to the indebtedness of the Debtor. Under the circumstances, the proceeding is actually a suit against the State barred by the Eleventh Amendment to the Constitution.

Lankford v. *Platte Iron Works,* 235 U. S. 461;
Murray v. *Wilson Distilling Co.,* 213 U. S. 151;
In the Matter of State of New York, 256 U. S. 490;
Smith v. *Reeves,* 178 U. S. 436, 445;
Cargile v. *New York Trust Co.,* 67 F. (2d) 585 (C. C.A. 8th), cert. den. 292 U. S. 625;
Samuel Adler, Inc. v. *Noyes,* 285 N. Y. 34, 37;
Edlux Construction Corp. v. *State of New York,* 252 App. Div. 373, 375, aff'd, 277 N. Y. 635;
Metropolitan Trust Co. v. *State Board of Tax Commissioners,* 220 N. Y. 344.

POINT II

The decision of the Circuit Court of Appeals is contrary to the recent decisions of this Court.

In *Great Northern Life Insurance Co.* v. *Read,* 322 U. S. 47, a State official was sued for alleged illegal action. This Court pointed out that the State, as here, had provided a forum for the redress of illegal or invalid action. The Court said (at p. 51):

> "Efforts to force, through suits against officials, performance of promises by a State, collide directly with the necessity that a sovereign must be free from judicial compulsion in the carrying out of its policies within the limits of the Constitution. [Citing cases.] A State's freedom from litigation was established as a constitutional right through the Eleventh Amendment. The inherent nature of sovereignty prevents actions against a state by its own citizens without its consent."

In *Ford Motor Co.* v. *Department of Treasury,* 323 U. S. 459, the suit was against State officers, again on the ground of illegal action alleged to be in violation of the provisions of the United States Constitution. This Court held that the action was barred by the provisions of the Eleventh Amendment to the Constitution of the United States, saying (at pp. 463-4):

> "But, they [the State officials] were joined as the collective representatives of the state not as individuals against whom a personal judgment is sought. The petitioner did not assert any claim to a personal judgment against these individuals for the contested tax payments."

In *Kennecott Copper Corp.* v. *State Tax Commission,* 327 U. S. 573, the funds were in the possession of State officials as "escrow holder," and were segregated from the general funds of the State. This Court held that the State was an indispensable party.

It is submitted that the decision of the Circuit Court of Appeals is contrary to the principles upon which those cases were decided and violative of the Eleventh Amendment. There is no constitutional foundation for the examination of the substantive merit of the State's claim as a preliminary to a determination as to its immunity from suit either nominally or through its officials. Colorability

of a State's claim is not a factor in the disposition of the claim of immunity from suit barred by the Eleventh Amendment. If the substantive merit of a State's claim may be summarily disposed of, as was done in the instant case, then the constitutional immunity of the State from suit becomes but an illusion.

True, "the essential nature and effect of the proceeding" may be considered *(Mine Safety Co.* v. *Forrestal,* 326 U. S. 371, 374; *In the Matter of State of New York,* 256 U. S. 490, 500), but when it appears from the record that the officials are sued solely in their official capacity and that the State has asserted the right to apply the property in its possession to the undisputed indebtedness to it and claims title to it, it is mere abstract dialectics to assert that the State has no "pecuniary interest" in the property. The practical consequence of this conclusion is to deprive the State of this property to reimburse itself for advances made out of its funds for grade crossing elimination.

No authority was cited either in the opinion of the District Court or of the Circuit Court of Appeals which authorizes an examination of a State's adverse claim as a preliminary consideration to the determination of constitutional immunity of its officials from suits when, as here, suit is brought against them for acts performed by them in a governmental capacity solely as State officials.

The District Court relied for its decision on *In re Bajardi,* 9 F. (2d) 797 (C. C. A. 2d), cert. den. *sub nom. People et al.* v. *Wilson, et al.,* 270 U. S. 651, in which no question of jurisdiction was raised, and *In re Fidelity Assurance Ass'n,* 42 F. Supp. 973 (D. C. S. D. W. Va.), order reversed 129 F. (2d) 442 (C. C. A. 4th), cert. granted 317 U. S. 614, aff'd 318 U. S. 608, in which no pecuniary interest of the State was asserted.

The Circuit Court of Appeals did not cite or place reliance upon these decisions as furnishing authority for overruling the claim of immunity. But the authorities cited in its opinion are equally inapplicable. *Hobbs* v. *Occidental Life Ins. Co.*, 87 F. (2d) 380 (C. C. A. 10th), and *Porter* v. *Beha*, 12 F. (2d) 513 (C. C. A. 2d) readily may be dismissed, since in neither of those cases was there any claim of proprietary or pecuniary interest of the State asserted.

Hopkins v. *Clemson College*, 221 U. S. 636, also cited by the Circuit Court of Appeals, adds no weight to the conclusion that there is an absence of immunity of state officials when sued solely as such for acts in obedience to the State's command. The question involved in that case was whether a corporation, which, under the act creating it, could sue and be sued, was liable individually "for its own corporate act in building for its own proprietary and corporate purposes a dyke which it is alleged damaged or took the plaintiff's farm" (at p. 649 of 221 U. S.). But, at bar, the question whether an individual, state official or private citizen, is liable personally for a wrongful act is not involved. The suit is against state officials, not personally but strictly as such officials (they are not even named individually), for property in which the State on the record before this Court contends it has a pecuniary interest. It is to be noted that the statute providing for the offices and bureaus of the State officials in the instant case does not authorize suits against them.

POINT III

The construction by the Circuit Court of Appeals of Section 50, Subdivision 3, of the Workmen's Compensation, as creating a fiduciary relationship between the self-insurer and the state official, is unwarranted.

The Circuit Court of Appeals, in considering the substantive merit of the State's claim, was deciding a suit against the State. Insofar as the jurisdiction of the District Court was concerned, the mere fact that the State claimed title to the fund was sufficient to deprive the Court of jurisdiction, regardless of that Court's opinion of the merits of the State's claim.

The Circuit Court of Appeals, however, in construing Section 50, Subdivision 3, of the Workmen's Compensation Law of the State of New York as creating "a fiduciary obligation" with the state officers as pledgees "without power of disposition, except to return it." concluded that (at p. 771):

> "The state officers, themselves, obviously have no claim against the debtor under the Grade Crossing Elimination Act and cannot hold the deposit adversely to the trustees."

This construction of the state statute as creating a fiduciary relationship between the self-insurer and the state officials, is without support in the authorities and is contrary to the essential nature of the deposit. The officials of the State did not receive the deposit as individuals but as administrative agents of the State. Any trust is one for the breach of which suit might be instituted in the State Court of Claims. In the exercise of its governmental functions, the State has forbidden the employment of workers in certain occupations unless compensation for injuries is se-

cured and the securities in question were given over to the State in accordance with such legislative declaration. *Matter of McQueeney* v. *Sutphen & Myer,* 167 App. Div. 528.

There is no trust in favor of the depositing self-insurer. The employees are the beneficiaries of the deposit. Where any possible liability to them is otherwise protected as by the substitution of satisfactory insurance, the "trust" terminates and is at an end. It does violence to the language and intent of the statute to hold, as was done by the Circuit Court of Appeals that the trust continued for the benefit of the self-insurer. On the contrary, the property in the possession of the State, upon the termination of any interest of the employees in such property, was applicable to the indebtedness of the self-insurer to the State.

Implicit in the requirement for the deposit of the securities was the authorization to the State to subject the deposit to the payment of the indebtedness of the self-insurer to it, at least after all possible claims of employees have been met. *Siegel* v. *State,* 262 App. Div. 388.

The reasoning of the Circuit Court of Appeals that the claim of the State cannot be asserted by the state officials since they "themselves, obviously have no claim against the debtor" is unsound (p. 771). In *Hobbs* v. *Occidental Life Ins. Co.,* 87 F. (2d) 380 (C. C. A. 10th), relied upon by the Court, the Court pointed out (at p. 384):

> "Where property is held by a third person, that is one not a party to the action and he makes a claim of right or title in himself *or on behalf of some other person not a party,* and such claim is adverse to that of the receiver, a plenary suit is necessary to recover possession." (Italics ours.)

All the more applicable is the stated rule to a situation such as this, where the state officials hold as agents of the State.

The Circuit Court of Appeals in holding that the claim of the State is merely colorable even if it had a pecuniary interest relied upon *Libby* v. *Hopkins*, 104 U. S. 303, *Morris* v. *Windsor Trust Co.*, 213 N. Y. 27 and *Pink* v. *Title Guarantee & Trust Co.*, 274 N. Y. 167. None of these cases is in point.

Libby v. *Hopkins* may be dismissed from consideration because there the narrow question was whether the relevant section of the Bankruptcy Act authorized a set-off by an agent who had feloniously diverted funds sent to him for a special purpose. In the instant case the question is whether under the law of New York the State could have asserted the claim in response to any suit for the return of the securities. The Bankruptcy Act is not involved.

The New York statute (Section 266, Civil Practice Act, as amended in 1936), provides that

> "any cause of action in favor of the defendants or some of them against the plaintiffs or some of them, a person whom the plaintiff represents or a plaintiff and another person or persons alleged to be liable"

may furnish the basis of a counterclaim. Prior to the amendment of 1936, the right to interpose a counterclaim was substantially circumscribed.

The two New York cases cited by the Circuit Court of Appeals were decided under the former provisions of section 266, Civil Practice Act, and do not represent the correct rule of law under the amended statute. In *Morris* v. *Windsor Trust Co., supra,* the Court observed (at p. 29):

> "That the counterclaims do not come within the classes enumerated in section 501 of the Code of Civil Procedure does not seem to be doubtful. [Citation]. The question remains whether they may be sustained as set-offs either under section 68 of the Bankruptcy Act, or,

in view of the indorser's insolvency, under the general principles of equity."

Likewise, *Pink* v. *Title Guarantee & Trust Co., supra,* while decided by the Court of Appeals after the amendment to section 266, Civil Practice Act, was specifically limited to the construction of "former section 266 of the Civil Practice Act" (p. 172 of 274 N. Y.) and "within the meaning of section 266 of the Civil Practice Act, as it existed at the date of the pleading" (p. 177). How impossible, therefore, becomes reliance on these cases for the proposition that a set-off may not be asserted under the present statute to a "conversion" claim.

The State has a right to set-off against the value of the securities the amount of the indebtedness to it. Any other rule of law would deprive the State of a right accorded to other litigants.

Kaufman v. *Provident Savings Bank & Trust Co.,* 23 N. Y. S. (2d) 637, aff'd 263 App. Div. 703, leave to app. den. 263 App. Div. 809;
Bricken Constr. Corp. v. *Cushman,* 163 Misc. 371.

The Court of Claims of the State of New York has jurisdiction to "hear and determine a claim * * * for the appropriation of * * * personal property" or for the alleged tort of its officers and to "hear and determine *any claim in favor of the state against the claimant*" (Emphasis supplied). (Court of Claims Act, Sec. 9, added Laws 1939 ch. 860, in effect July 1, 1939.)

In accordance with the grant of such jurisdiction the State has waived immunity not only from suit but also from liability for the misfeasance or negligence of its officials or for damages for property, provided suit is brought in the Court of Claims (Court of Claims Act, Sec. 8; *Jackson* v. *State,* 261 N. Y. 134).

It is thus evident that the restriction imposed by the Circuit Court of Appeals on the nature of a counterclaim or set-off that may be asserted by the State is contrary not only to the practice applicable in the state courts, but also to the express language of the Court of Claims Act which authorizes the State to set-off any claim in its favor.

There is no plausible basis for the assertion that the counterclaim of the State, itself, is but colorable. There is, in fact, no dispute as to the verity of the claim. The alleged colorability is in the asserted inability to set-off this counterclaim against the property of the Debtor in the possession of the State. But the law of the State, as has been observed, affords the State the right to set-off any claim against the claim of the Debtor.

In any event, the question of the alleged inability of the State to set-off this indebtedness against the property in the possession of its officials under section 50 of the Workmen's Compensation Law, has not been decided by the Court of Appeals of the State or by this Court. In the process of restricting the State's immunity from suit under the Eleventh Amendment, the Circuit Court passed on the substantive merits of the State's claim and, thus, "passed on the initial interpretation and meaning of a state statute * * * without a previous authoritative interpretation of the statute by the highest court of the state." *Kennecott Copper Corp.* v. *State Tax Commission,* 327 U. S. 573. It is submitted that the Trustees should have been relegated to the Court of Claims of the State, a process by which such an "authoritative interpretation" would have been obtained, rather than the summary disposition by the Circuit Court of Appeals.

CONCLUSION

The writ of certiorari should be granted.

Dated, March 15, 1947.

Respectfully submitted,

NATHANIEL L. GOLDSTEIN,
Attorney General of the State of New York.

WENDELL P. BROWN,
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